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MPPL & ANOR v. CAS

FEDERAL COURT, PUTRAJAYA
ZABARIAH MOHD YUSOF FCJ
HASNAH MOHAMMED HASHIM FCJ
HARMINDAR SINGH DHALIWAL FCJ
B NORDIN HASSAN FCJ
ABU BAKAR JAIS FCJ
[CIVIL APPEAL NO: 02(f)-49-08-2023(W)]
3 JULY 2024

C

Abstract – *Being the biological father of a child does not automatically mean that one is the father recognised in law. The presumption under s. 112 of the Evidence Act 1950 provides a cloak that presumes that a father in a lawful marriage is both the biological and legal father of the child. That cloak ought not to be shared with a third party as of right, regardless of whether the third party is the biological father of the child, much less when the third party is unsure and unable to prove his purported paternity. In this light, a forced paternity test on a child is an extreme measure that would invade the personal autonomy of a child, more so, when the child is not seeking to know her paternity. The court's jurisdiction under s. 24(d) of the Courts of Judicature Act 1964, is only over the person and property of an infant; the section does not provide with any enabling power to the courts to order DNA testing.*

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CIVIL PROCEDURE: *Jurisdiction – Inherent jurisdiction – Child born during subsistence of valid marriage of parents – Application for deoxyribonucleic acid ('DNA') test to determine paternity of child by third party – Whether DNA test allowed in civil proceedings – Whether written statutory provision or common law provide power for DNA test against adult of child in civil proceedings – Whether inherent jurisdiction under O. 92 r. 4 of Rules of Court 2012 exercised only to prevent procedural injustice – Whether could be invoked to facilitate substantive right*

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EVIDENCE: *Presumption – Presumption of fact – Section 112 of Evidence Act 1950 – Birth during marriage conclusive proof of legitimacy – Child born during subsistence of valid marriage of parents – Application for deoxyribonucleic acid ('DNA') test to determine paternity of child by third party – Whether paternity and legitimacy two different concepts – Whether legitimacy of child fact in issue – Whether evidence could be admitted to rebut presumption – Whether 'conclusive proof' in s. 112 bars admissibility of scientific evidence to prove paternity of child born out of wedlock – Evidence Act 1950, s. 4(3)*

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I

FAMILY LAW: *Children – Legitimacy – Child born during subsistence of valid marriage of parents – Application for deoxyribonucleic acid ('DNA') test to determine paternity of child by third party – Whether paternity and legitimacy two different concepts – Whether legitimacy of child fact in issue – Whether evidence*

could be admitted to rebut presumption – Whether 'conclusive proof' in s. 112 bars admissibility of scientific evidence to prove paternity of child born out of wedlock – Whether DNA test allowed in civil proceedings – Evidence Act 1950, s. 4(3)

FAMILY LAW: *Children – Paternity – Child born during subsistence of valid marriage of parents – Application for deoxyribonucleic acid ('DNA') test to determine paternity of child by third party – Whether paternity and legitimacy two different concepts – Whether legitimacy of child fact in issue – Whether evidence could be admitted to rebut presumption – Whether 'conclusive proof' in s. 112 bars admissibility of scientific evidence to prove paternity of child born out of wedlock – Whether DNA test allowed in civil proceedings – Whether protective jurisdiction of parens patriae successful – Whether best interest and welfare of child outweighs 'right to know' – Whether DNA test would be damaging and disrupting to child's status quo – Rules of Court 2012, O. 92 r. 4 – Evidence Act 1950, s. 4(3)*

The defendants husband ('D2') and wife ('D1') were married in 2007 and in the course of the marriage, D1 gave birth to C. D2 was registered as the father of C in the birth certificate of C. Despite C being born during the subsistence of D2's marriage to D1, the plaintiff claimed C to be his biological daughter conceived by D1 due to his sexual relationship with D1. Hence, the plaintiff sought an order *vide* an originating summons ('OS') for a deoxyribonucleic acid ('DNA') test to be conducted on C to ascertain and prove his paternity. In the event he was the biological father, he sought a declaration of his status and that he be granted access and to maintain C. C was unaware of these litigation proceedings and neither did the parties inform C that she was the subject matter of the series of litigation. The application was not made on behalf of C, nor was C seeking the truth of her birth. There was also no issue of maintenance or custody in respect of C. D2 neither challenged nor disputed that he was the biological father to C. The marriage of D2 and D1 was subsisting and remained valid to this day. The defendants, opposing the plaintiff's application, filed an application under O. 14A of the Rules of Court 2012 ('ROC') to dismiss the OS on the grounds that pursuant to the presumption of legitimacy under s. 112 of the Evidence Act 1950 ('EA'), the fact that C was born during D1's valid marriage to D2 was conclusive proof that the child was the legitimate child of D2. The High Court allowed the defendants' O. 14A application and summarily dismissed the OS. On appeal, the Court of Appeal ('CA'), held, *inter alia*, that paternity and legitimacy are separate issues. The CA also found that there were crucial matters which warranted the amended OS to be converted into a writ action and hence, remitted the matter to the High Court for a full trial for determination of the issue of paternity which were in dispute and were not addressed by the High Court. On further appeal to the Federal Court, the decision of the CA was affirmed to the extent that the matter be remitted to the High Court for a full trial. The High Court allowed the plaintiff's application and ordered a DNA test to be conducted in order to ascertain and confirm C's paternity and that, in the event the DNA test showed the plaintiff to be the biological father of C, then a declaration should issue to confirm

A the same. Dissatisfied, the defendants appealed to the CA. The CA affirmed the order of the High Court. Hence, this appeal. The questions of law that arose for determination in this appeal were: (i) whether legitimacy and paternity are two distinct concepts, taking into consideration the recent Federal Court decision in *Leow Fook Keong v. Pendaftar Besar Bagi Kelahiran*
B *dan Kematian Malaysia, Jabatan Pendaftaran Negara Malaysia & Anor* which compels information in birth certificates to be corrected or amended to reflect available evidence and facts; (ii) whether s. 112 of the EA, being an evidential construct, would apply to confer legitimacy on a child born during the subsistence of a lawful marriage even where there is scientific evidence
C available that the said child is the biological child of another male; (iii) what constitutes 'no access' between parties to the marriage, in s. 112 of the EA; (iv) whether s. 4(3) of the EA bars the court from making an order for DNA testing for the purposes of rebutting the conclusive proof where s. 112 of the EA applies and provides for legitimacy of a child born during the subsistence
D of a valid marriage between the mother and her husband; (v) whether the civil court can compel a child to undergo DNA testing to determine paternity when the court is without power to compel an adult to undergo DNA testing; (vi) what is the extent of the court's role as *parens patriae* and whether the court's power is circumscribed by: (a) statutory provisions; and/or (b) s. 3(1) of the Civil Law Act 1956 and the proviso which states 'Provided always that
E the said common law, rules of equity and statutes of general application shall be applied so far only as the circumstances of the States of Malaysia and their respective inhabitants permit and subject to such qualifications as local circumstances render necessary'; and (vii) whether the right of a child to know his/her biological parents shall be the paramount consideration and
F shall prevail over other welfare considerations in relation to the child, taking into account Malaysia's express reservations to article 7 of the United Nations Convention on the Rights of the Child ('UNCRC').

Held (allowing appeal)

Per Zabariah Mohd Yusof FCJ delivering the judgment of the court:

G **(1)** Section 112 of the EA provides that, if a child is born during a marriage, or 280 days after the marriage is dissolved and the mother remains unmarried, the husband shall be conclusively presumed to be the child's father. The only fact that can rebut this presumption is the lack of sexual access. Section 112 of the EA is only applicable where the legitimacy of
H a child is a fact in issue or relevant facts. Nowhere in s. 112 of the EA is the word 'paternity' mentioned. Paternity is determined factually which is objective and descriptive by nature. On the other hand, legitimacy concerns recognition in law. In construing s. 112 of the EA, the presumption essentially determined the legal father of the child.
I The question of paternity could not be disassociated with the question of legitimacy of a child in such construction. (paras 41-43)

(2) A biological father to someone does not automatically mean that he is the father of the child recognised in law. The presumption under s. 112 of the EA provides a cloak that presumes that a father in a lawful marriage is both the biological and legal father of the child. It is not right if that cloak could be purported to be shared with a third party as of right, regardless of whether the third party is the biological father of the child, much less when the third party is unsure and unable to proof his purported paternity. The birth certificate of C reflected that D2 was the father of C as C was born during the subsistence of the marriage between D1 and D2. Further, to allow for legal rights, benefits and obligation to flow from a mere determination of biological paternity, would be to allow a collateral attack on a child's legitimacy. However, the existence of a legal distinction between paternity and legitimacy would bar the plaintiff from claiming remedies associated with legitimacy as of right. The court thus declined to answer question (i). (paras 52, 55, 56 & 61)

(3) The court declined to answer question (iii) as the issue of 'no access' was never raised as an issue in the High Court or the CA. (para 64)

(4) In cases concerning children, the aftermath of an order must be assessed against the future of the child, that is, the interest of the child must be considered. This is especially in light of the very likely fact that s. 112 of the EA is an evidential construct and could not afford protection to C beyond the court proceedings. It appears that 'conclusive proof' in s. 112 bars the admissibility of scientific evidence to prove the paternity of a child born out of wedlock. The phrase 'conclusive proof' is also engaged in s. 4(3) of the EA to indicate that when presumption uses the phrase, the court is not allowed to admit evidence to rebut the presumption. The only rebuttable facts allowed by the provision and can be admitted by the court is evidence of 'no access' between husband and wife. Section 4(3) serves as a bar to effectuate a safeguard against any potential challenge to conclusive proof, which in this case was proof of legitimacy. Since C was born into a valid marriage between the defendants and there was no evidence to show that the defendants did not have access to each other, the conclusive presumption of legitimacy was still in place. The court declined to answer question (ii) whereas, question (iv) was answered in the negative as the provision of s. 4(3) of the EA bars any order for DNA testing for the purposes of rebutting s. 112 of the EA. (paras 76, 78, 80, 81 & 86-88)

(5) There appears to be no specific written statutory provision or common law providing for power to the courts to order any person, be it an adult or a child, to undergo a DNA test in civil proceedings. While O. 92 r. 4 of the ROC confers upon the courts the inherent jurisdiction and power to prevent injustice or abuse of the process of the court, this

provision is only to prevent procedural injustice. It could not be utilised to invoke or facilitate a substantive right, which is not provided for, *albeit* unjustly denied. Hence, the CA erred in law in upholding the High Court judgment that O. 92 r. 4 of the ROC could be the source of the court's power to order DNA testing, which was a substantive order affecting the substantive rights of parties. Further, the presumption of legitimacy has proven to be one of the most restraining elements in the UK and Scotland, in making an order against an individual for a blood test. Question (v) was thus answered in the negative. (paras 92, 96, 97, 102 & 103)

(6) There is a wide and all-encompassing ambit of the *parens patriae* jurisdiction to make any order necessary for the protection of a child. The primary consideration is acting in the best interest of the child's welfare. While our courts have jurisdiction on matters involving infants under s. 24(d) of the Courts of Judicature Act 1964 ('CJA'), it must derive its power from written legislation as provided under s. 25 of the CJA to make orders in the best interest of children under our written law. Absent such power conferred upon the court by written law, it cannot derive self-made power from its role as *parens patriae* from the mere fact that it has jurisdiction over children. Jurisdiction and powers are two separate concepts. Jurisdiction does not confer power. Section 24(d) of the CJA only provides the courts the jurisdiction generally over the person and property of infants; it does not provide with any enabling power to the courts to order DNA testing. (paras 113, 117, 118 & 126)

(7) In this case, the subject matter to be protected was the interest of C and C alone. The wide powers under *parens patriae* are to be exercised in a protective capacity restrictively. The plaintiff was unable to invoke the protective jurisdiction of *parens patriae* as he had not shown anything serious in which C needs protecting from. Furthermore, the inherent powers of the courts would not have an appropriate ground to be invoked as the plaintiff had not shown any procedural impropriety that might arise from a failure to grant the DNA order sought. Question (vi) was answered in the positive. (paras 115, 131, 133 & 134)

(8) The 'right to know' could not be the paramount consideration for assessing the best interest and welfare of a child. There must be a holistic welfare analysis before the best interest of a child could be determined. Consent from the child is part and parcel of respecting the welfare of the child, which is especially important for children who are at the stage of adolescence. Forced paternity test was an extreme measure that invades the personal autonomy of C, who was not seeking to know her paternity and did not even know there was an application by a third party for a DNA test to be conducted. The very act of taking C to do the DNA test

was in itself damaging, disrupting her *status quo* and putting into question the only reality she had known for the past 15½ years, *ie*, that D1 and D2 are her parents. She may be exposed to odium and humiliation if found to be born out of her mother's extra marital affair and hence an illegitimate child. (paras 141 & 144)

Bahasa Melayu *Headnotes*

Defendan-defendan suami ('D2') dan isteri ('D1') berkahwin pada 2007 dan dalam tempoh perkahwinan tersebut, D1 melahirkan C. D2 didaftarkan sebagai bapa C dalam sijil kelahiran C. Walaupun C dilahirkan dalam tempoh D2 berkahwin dengan D1, plaintif mendakwa C adalah anak kandungnya yang dikandung oleh D1 hasil hubungan kelamin dengan D1. Oleh itu, plaintif memohon satu perintah, melalui saman pemula ('OS'), agar ujian deoxyribonucleic acid ('DNA') dibuat terhadap C untuk memutuskan dan membuktikan paternitinya. Jika dia adalah bapa kandung, plaintif memohon pengisytiharan statusnya dan agar dia diberi akses dan dibenarkan menanggung C. C tiada pengetahuan tentang prosiding litigasi dan pihak-pihak juga tidak memaklumkan C bahawa dia membentuk hal perkara beberapa litigasi. Permohonan tersebut tidak dibuat bagi pihak C, dan C tidak mencari kebenaran tentang kelahirannya. Juga, tiada isu tanggungan atau hak jagaan berkaitan C. D2 tidak mencabar atau mempertikaikan bahawa dia adalah bapa kandung C. Perkahwinan D2 dan D1 masih kekal dan sah sehingga kini. Defendan-defendan, yang membantah permohonan plaintif, memfailkan permohonan bawah A. 14A Kaedah-kaedah mahkamah 2012 ('KKM') untuk menolak OS atas alasan-alasan bahawa menurut anggapan kesahan bawah s. 112 Akta Keterangan 1950 ('Akta'), fakta bahawa C lahir dalam tempoh perkahwinan sah antara D1 dan D2 adalah bukti konklusif bahawa anak itu anak D2 yang sah taraf. Mahkamah Tinggi membenarkan permohonan A. 14A defendan-defendan dan menolak terus OS itu. Susulan rayuan, Mahkamah Rayuan ('MR') memutuskan, antara lain, bahawa paterniti dan kesahan adalah isu-isu berasingan. Mahkamah Rayuan juga memutuskan bahawa terdapat perkara-perkara penting yang mewajarkan OS ditukar menjadi tindakan writ dan oleh itu, mengembalikan perkara itu ke Mahkamah Tinggi untuk perbicaraan penuh untuk menentukan isu paterniti yang dipertikaikan dan yang tidak dipertimbangkan oleh Mahkamah Tinggi. Ekoran rayuan lanjut ke Mahkamah Persekutuan, keputusan MR disahkan setakat untuk perkara itu dikembalikan ke Mahkamah Tinggi untuk perbicaraan penuh. Mahkamah Tinggi membenarkan permohonan plaintif dan mengarahkan ujian DNA dijalankan untuk menetapkan dan mengesahkan paterniti C dan jika ujian DNA menunjukkan plaintif adalah bapa kandung C, maka satu deklarasi perlu dikeluarkan untuk mengesahkan perkara itu. Tidak berpuas hati, defendan-defendan merayu ke MR. Mahkamah Rayuan mengesahkan perintah Mahkamah Tinggi. Oleh itu, rayuan ini. Soalan-soalan undang-undang yang

timbul untuk dipertimbangkan dalam rayuan ini adalah: (i) sama ada kesahan dan paterniti adalah dua konsep berasingan, mengambil kira keputusan Mahkamah Persekutuan terkini dalam *Leow Fook Keong v. Pendaftar Besar Bagi Kelahiran dan Kematian Malaysia, Jabatan Pendaftaran Negara Malaysia & Anor* yang mendesak maklumat dalam sijil kelahiran dibetulkan atau dipinda untuk menggambarkan keterangan dan fakta yang ada; (ii) sama ada s. 112 Akta, sebagai pertimbangan keterangan, diguna pakai untuk memberikan kesahan terhadap kanak-kanak yang lahir dalam tempoh sah perkahwinan walaupun ada keterangan saintifik bahawa kanak-kanak itu adalah anak kandung lelaki lain; (iii) apa yang membentuk 'tiada akses' antara pihak-pihak dalam perkahwinan, bawah s. 112 Akta; (iv) sama ada s. 4(3) Akta menghalang mahkamah daripada memerintahkan ujian DNA untuk tujuan mematahkan bukti konklusif apabila s. 112 Akta terpakai dan memperuntukkan kesahan anak yang dilahirkan dalam tempoh perkahwinan sah ibu tersebut dengan suaminya; (v) sama ada mahkamah sivil boleh memaksa kanak-kanak melalui ujian DNA untuk menentukan paterniti apabila mahkamah tiada kuasa untuk memaksa orang dewasa melalui ujian DNA; (vi) setakat mana peranan mahkamah sebagai *parens patriae* dan sama ada kuasa mahkamah terhad oleh: (a) peruntukan-peruntukan statutori; dan/atau (b) s. 3(1) Akta Undang-undang Sivil 1956 dan proviso yang menyatakan 'Provided always that the said common law, rules of equity and statutes of general application shall be applied so far only as the circumstances of the States of Malaysia and their respective inhabitants permit and subject to such qualifications as local circumstances render necessary'; dan (vii) sama ada hak kanak-kanak untuk mengetahui siapa ibu bapa kandungnya adalah pertimbangan utama dan mengatasi pertimbangan kebajikan lain berkaitan kanak-kanak tersebut, mengambil kira keraguan Malaysia terhadap perkara 7 Konvensyen Mengenai Hak Kanak-kanak Pertubuhan Bangsa-bangsa Bersatu.

Diputuskan (membenarkan rayuan)

Oleh Zabariah Mohd Yusof HMP menyampaikan penghakiman mahkamah:

(1) Seksyen 112 Akta memperuntukkan bahawa, jika seorang kanak-kanak dilahirkan dalam tempoh satu perkahwinan, atau 280 hari selepas perkahwinan dibubarkan dan ibu tersebut kekal tidak berkahwin, suaminya dianggap secara konklusif sebagai bapa kanak-kanak itu. Satu-satunya fakta yang boleh mematahkan anggapan ini adalah ketiadaan akses hubungan kelamin. Seksyen 112 Akta hanya diguna pakai apabila kesahan kanak-kanak itu menjadi isu fakta atau fakta relevan. Perkataan 'paterniti' tidak disebut dalam mana-mana pun dalam s. 112 Akta. Paterniti ditentukan secara fakta yang bersifat objektif dan deskriptif. Sebaliknya, kesahan berkait dengan pengiktirafan di sisi undang-undang. Dalam pentafsiran s. 112 Akta, pada dasarnya, anggapan menentukan bapa sah kanak-kanak itu. Persoalan paterniti tidak boleh diasingkan daripada persoalan kesahan kanak-kanak dalam pentafsiran sedemikian.

(2) Bapa kandung seseorang tidak secara automatik bermaksud dia adalah bapa kanak-kanak yang diiktiraf oleh undang-undang. Anggapan bawah s. 112 Akta memperuntukkan satu selubung yang menganggap bahawa bapa dalam perkahwinan sah adalah kedua-duanya, bapa kandung dan bapa sah kanak-kanak tersebut. Tidak betul untuk selubung itu dikongsi oleh pihak ketiga secara terus, tidak kira sama ada pihak ketiga itu adalah bapa kandung kanak-kanak, apatah lagi apabila pihak ketiga tidak pasti dan tidak boleh membuktikan paterniti yang didakwa. Sijil kelahiran C menunjukkan bahawa D2 adalah bapa C kerana C lahir dalam tempoh perkahwinan antara D1 dan D2. Selanjutnya, untuk membenarkan hak, faedah dan kewajipan undang-undang berbangkit daripada penentuan paterniti kandung semata-mata, bermaksud membenarkan serangan kolateral terhadap kesahan kanak-kanak. Walau bagaimanapun, kewujudan perbezaan antara paterniti dan kesahan dari segi undang-undang akan menghalang plaintif daripada menuntut remedi-remedi yang berkait dengan kesahan secara terus. Oleh itu, mahkamah menolak untuk menjawab soalan (i).

(3) Mahkamah menolak untuk menjawab soalan (iii) kerana isu 'tiada akses' tidak pernah dibangkitkan sebagai isu di Mahkamah Tinggi mahupun MR.

(4) Dalam kes-kes berkaitan kanak-kanak, akibat satu-satu perintah perlu dinilai terhadap masa depan kanak-kanak itu, iaitu, kepentingan kanak-kanak perlu diberi pertimbangan. Ini khususnya berdasarkan fakta bahawa s. 112 Akta adalah tafsiran keterangan dan tidak memberi perlindungan pada C melangkaui prosiding mahkamah. Jelas bahawa 'bukti konklusif' dalam s. 112 menghalang penerimaan masuk keterangan saintifik untuk membuktikan paterniti kanak-kanak yang lahir luar nikah. Frasa 'bukti konklusif' juga digunakan dalam s. 4(3) Akta untuk menunjukkan apabila anggapan menggunakan frasa itu, mahkamah tidak dibenarkan menerima masuk keterangan untuk mematahkan anggapan itu. Satu-satunya fakta mematahkan yang dibenarkan oleh peruntukan tersebut dan boleh diterima masuk oleh mahkamah adalah keterangan 'tiada akses' antara suami dan isteri. Seksyen 4(3) bertindak sebagai halangan pelaksanaan perlindungan untuk apa-apa potensi cabaran terhadap bukti konklusif, yang dalam kes ini adalah bukti kesahan. Oleh sebab C lahir dalam tempoh perkahwinan sah antara defendan-defendan dan tiada keterangan menunjukkan defendan-defendan tiada akses terhadap satu sama lain, anggapan konklusif kesahan masih kekal. Mahkamah enggan menjawab soalan (ii) manakala soalan (iv) dijawab dalam negatif kerana peruntukan s. 4(3) Akta menghalang apa-apa perintah ujian DNA untuk tujuan mematahkan s. 112 Akta.

(5) Tiada peruntukan statutori bertulis spesifik atau common law yang memperuntukkan kuasa untuk mahkamah memerintahkan mana-mana orang, sama ada dewasa atau kanak-kanak, menjalani ujian DNA dalam prosiding sivil. Walaupun A. 92 k. 4 KKM memberi mahkamah bidang kuasa sedia ada dan kuasa untuk menghalang ketidakadilan atau salah guna proses mahkamah, peruntukan ini hanya untuk menghalang ketidakadilan prosedur. Ini tidak boleh digunakan untuk menimbulkan atau membantu hak substantif, yang tidak diperuntukkan, walaupun dinafikan secara tidak adil. Oleh itu, MR terkhilaf dari segi undang-undang apabila mengesahkan penghakiman Mahkamah Tinggi bahawa A. 92 k. 4 KKM boleh menjadi sumber kuasa mahkamah untuk memerintahkan ujian DNA, yang adalah perintah substantif yang menjejaskan hak-hak substantif pihak-pihak. Tambahan lagi, anggapan kesahan terbukti salah satu unsur penghalang di UK dan Scotland, apabila memerintahkan ujian darah dijalankan terhadap satu-satu individu. Soalan (v) dengan itu dijawab secara negatif.

(6) Terdapat ruang lingkup luas dan menyeluruh bidang kuasa *parens patriae* untuk membuat apa-apa perintah yang perlu untuk perlindungan kanak-kanak. Pertimbangan asas adalah bertindak demi kepentingan terbaik kebajikan kanak-kanak itu. Walaupun mahkamah kita mempunyai bidang kuasa terhadap perkara-perkara melibatkan bayi bawah s. 24(d) Akta Mahkamah Kehakiman 1964 ('AMK'), ini perlu memperoleh kuasanya daripada perundangan bertulis seperti yang diperuntukkan bawah s. 25 AMK untuk membuat perintah demi kepentingan terbaik kanak-kanak bawah undang-undang bertulis. Tanpa kuasa yang diperuntukkan terhadap mahkamah bawah undang-undang bertulis, mahkamah tidak boleh memperoleh kuasa buatannya sendiri daripada peranannya sebagai *parens patriae* semata-mata daripada fakta bahawa ia mempunyai bidang kuasa terhadap kanak-kanak. Bidang kuasa dan kuasa adalah dua konsep berbeza. Bidang kuasa tidak memperuntukkan kuasa. Seksyen 24(d) AMK hanya memperuntukkan mahkamah dengan bidang kuasa umum terhadap diri dan hak milik bayi; itu tidak memperuntukkan apa-apa kuasa yang membolehkan mahkamah memerintahkan ujian DNA.

(7) Dalam kes ini, hal perkara yang perlu dilindungi adalah kepentingan C dan hanya C sahaja. Kuasa luas bawah *parens patriae* perlu dilaksanakan secara terhad dalam kapasiti perlindungan. Plaintif tidak boleh membangkitkan bidang kuasa perlindungan *parens patriae* kerana dia tidak menunjukkan apa-apa yang serius yang memerlukan agar C dilindungi. Tambahan lagi, tiada alasan wajar untuk membangkitkan bidang kuasa sedia ada mahkamah kerana plaintif tidak menunjukkan apa-apa ketidakwajaran prosedur yang mungkin berbangkit daripada kegagalan memberikan perintah DNA yang dipohon. Soalan (vi) dijawab secara positif.

(8) 'Hak untuk mengetahui' tidak boleh menjadi pertimbangan utama untuk menilai kepentingan terbaik dan kebajikan kanak-kanak. Analisis kebajikan yang menyeluruh perlu dibuat sebelum kepentingan terbaik kanak-kanak diputuskan. Persetujuan oleh kanak-kanak adalah salah satu cara memberi penghormatan terhadap kebajikan kanak-kanak, yang khususnya penting untuk kanak-kanak di peringkat remaja. Ujian paterniti yang dipaksa adalah langkah yang melampau yang mencerobohi autonomi C, yang tidak memohon untuk mengetahui paternitinya dan malahan tidak mengetahui tentang permohonan oleh pihak ketiga agar ujian DNA dilakukan. Tindakan membawa C untuk melakukan ujian DNA itu sendiri adalah memudaratkan, mengganggu *status quo* dan mempersoalkan satu-satunya realiti yang diketahui C selama 15½ tahun, iaitu, D1 dan D2 adalah ibu bapanya. Dia mungkin akan terdedah pada kebencian dan penghinaan jika didapati lahir daripada hubungan luar nikah ibunya dan oleh itu adalah anak tak sah taraf.

Case(s) referred to:

Aparna Ajinkya Firodia v. Ajinkya Arun Firodia [2023] SCC On Line SC 161 ***(refd)***
B(BR) v. B(J) And Another [1968] 3 WLR 566 ***(refd)***
Babu Remyalayam Veettil v. Vidya d/o Santhini Kalathinte Padeetthathil Veettil (OP(FC) No 507 of 2014 ***(refd)***
Bhabani Prasad Jena v. Convenor Secretary, Orissa State Commission For Women And Another [2010] 8 SCC 633 ***(refd)***
CAS v. MPPL & Anor [2019] 2 CLJ 454 CA ***(refd)***
Chua Kim Suan v. Ang Mek Chong [1988] 3 MLJ 231 ***(refd)***
Cotton v. Cotton [1954] 2 WLR 947 ***(refd)***
Eyre v. Countess Of Shaftsbury (1558-1774) All ER Report 129 ***(refd)***
Goutam Kundu v. State Of West Bengal And Another [1993] 3 SCC 418 ***(refd)***
In Re L [1968] 1 All ER 20 ***(refd)***
Jabatan Pendaftaran Negara & Ors v. Seorang Kanak-kanak & Ors; Majlis Agama Islam Negeri Johor (Intervener) [2020] 4 CLJ 731 FC ***(refd)***
Lee Lai Cheng (Suing As The Next Friend Of Lim Chee Zheng And Herself) v. Lim Hooi Teik [2017] 6 CLJ 668 HC ***(refd)***
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Lee Lee Cheng v. Seow Peng Kwang [1959] CLJU 107; [1959] 1 LNS 107 CA ***(refd)***
Leow Fook Keong v. Pendaftar Besar Bagi Kelahiran Dan Kematian Malaysia, Jabatan Pendaftaran Negara, Malaysia & Anor [2022] 1 CLJ 23 FC ***(dist)***
Lionel Lau Siang Kok v. Datuk Seri Panglima Lau Chon Kun [2013] 1 CLJ 619 CA ***(refd)***
Mahabir Prasad v. Pushpa Mahabir Prasad [1981] CLJ 124A; [1981] CLJ (Rep) 65 FC ***(refd)***
Majlis Peguam & Anor v. Tan Sri Dato' Mohamed Yusoff Mohamed [1997] 3 CLJ 332 SC ***(refd)***
Nandlal Wasudeo Badwaik v. Lata Nandlal Badwaik [2014] 2 SCC 576 ***(refd)***
Pathmanabhan Nalliannen v. PP & Other Appeals [2017] 4 CLJ 137 FC ***(refd)***
Peter James Binsted v. Jevencia Autor Partosa [2000] 2 CLJ 906 HC ***(refd)***
Re Spence [1847] 41 ER 937 ***(refd)***
Rohit Shekhar v. Narayan Dutt & Anor (FAQ (OS) No. 547/2011 ***(refd)***

Sharda v. Dharmpal [2003] 4 SCC 493 ***(refd)***
Stone World Sdn Bhd v. Engareh (M) Sdn Bhd [2020] 9 CLJ 358 FC ***(refd)***
Tenaga Nasional Bhd v. Evergrowth Aquaculture Sdn Bhd & Other Appeals [2021] 9 CLJ 179 FC ***(refd)***
W v. H [1987] 2 MLJ 235 ***(refd)***
Watson v. Watson [1953] 3 WLR 708 ***(refd)***
Whitehall v. Whitehall [1958] SC 252 ***(refd)***

Legislation referred to:
Civil Law Act 1956, s. 3(1)(a)
Courts of Judicature Act 1964, ss. 24(d), (e), (f), 25(2), Schedule paras 1, 8
Evidence Act 1950, ss. 2, 4(3), 112
Federal Constitution, art. 121(1), (1A)
Rules of Court 2012, O. 14A, O. 92 r. 4
United Nations Convention on the Rights of the Child, arts. 3(1), 7, 8

Code of Civil Procedure 1908 [Ind], ss. 151, 75(e)
Evidence Act 1893 [Sing], ss. 47(1), 114
Family Law Reform Act 1969 [UK], s. 20
Supreme Court of Judicature Act 1969 [Sing], s. 17(d)
The Constitution of India [Ind], O. 26 r. 10A

For the appellants - Foo Yet Ngo, Kiran Dhaliwal & Yu Yi Lin; M/s YN Foo & Partners
For the respondent - Tay Kit Hoo; M/s Seira & Sharizad

[Editor's note: For the Court of Appeal judgment, please see MPPL & Anor v. CAS [2023] 6 CLJ 22 (overruled); Appeal from High Court, Kuala Lumpur; Originating Summons WA-24F-107-07-2015 (overruled).]

Reported by S Barathi

JUDGMENT

Zabariah Mohd Yusof FCJ:

Introduction

[1] This is an appeal by the defendants against the decision of the Court of Appeal, which affirmed the decision of the High Court. The High Court allowed the application by the plaintiff (who claims to be the biological father of a child), for an order, *inter alia*, to compel a DNA test to be done on a child to determine the paternity of the same.

[2] On 8 August 2023, the Federal Court granted leave to the defendants to appeal premised upon the following seven questions of law:

(i) whether legitimacy and paternity are two distinct concepts, taking into consideration the recent Federal Court decision in *Leow Fook Keong v. Pendaftar Besar Bagi Kelahiran Dan Kematian Malaysia, Jabatan Pendaftaran Negara, Malaysia & Anor* [2022] 1 CLJ 23 which compels information in birth certificates to be corrected or amended to reflect available evidence and facts?

(ii) whether s. 112 of the Evidence Act 1950, being an evidential construct, would apply to confer legitimacy on a child born during the subsistence of a lawful marriage even where there is scientific evidence available that the said child is the biological child of another male?

(iii) what constitutes "no access" between parties to the marriage, in s. 112 of the Evidence Act 1950?

(iv) whether s. 4(3) of the Evidence Act 1950 bars the court from making an order for DNA testing for the purposes of rebutting the conclusive proof where s. 112 of the Evidence Act 1950 applies and provides for legitimacy of a child born during the subsistence of a valid marriage between the mother and her husband?

(v) whether the civil court can compel a child to undergo DNA testing to determine paternity when the court is without power to compel an adult to undergo DNA testing?

(vi) what is the extent of the court's role as *parens patriae* and whether the court's power is circumscribed by:

(a) statutory provisions; and/or

(b) section 3(1) of the Civil Law Act 1956 and the proviso which states "provided always that the said common law, rules of equity and statutes of general application shall be applied so far only as the circumstances of the States of Malaysia and their respective inhabitants permit and subject to such qualifications as local circumstances render necessary"?

(vii) whether the right of a child to know his/her biological parents shall be the paramount consideration and shall prevail over other welfare considerations in relation to the child, taking into account Malaysia's express reservations to art. 7 of the United Nations Convention on the Rights of the Child (UNCRC), which states that every child "shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents"?

The Salient Facts

[3] In this judgment, parties will be referred to, as in the High Court. The subject matter of the appeal, *ie*, the child, would be anonymised as "C".

[4] The defendants are husband (D2) and wife (D1) and they were married on 3 March 2007. In the course of the marriage, D1 gave birth to C on 23 June 2008. D2 is registered as the father of C in the birth certificate of C.

A **[5]** Despite C being born during the subsistence of D2's marriage to D1, the plaintiff, claims C to be his biological daughter conceived by D1 due to his sexual relationship with D1.

[6] *Vide* an originating summons (OS) filed at the High Court on 20 July 2015, the plaintiff sought an order for a deoxyribonucleic acid (DNA) test B to be conducted on C to ascertain and prove his paternity. In the event he is the biological father, he seeks for a declaration of his status and that he be granted access and to maintain C. At the time when the OS was filed, C was seven years old. At the time of this appeal, C is already 15½ years old.

C **[7]** The plaintiff claims the following:

(i) he and his mother were informed of his paternity of C by D1 herself;

(ii) he had sexual relationships with D1 before and during her marriage to D2, until around January 2014;

D (iii) he had access to C from her birth until December 2013; and

(iv) he provided financial support to D1 for C until around August 2014, when D1 closed her bank account.

[8] C is unaware of these litigation proceedings and neither did parties inform C that she is the subject matter of the series of litigation. The E application is not made on behalf of C, nor is C seeking for the truth of her birth. There is no issue of maintenance or custody in respect of C.

[9] D2 is not challenging and neither is he disputing that he is the biological father to C. The marriage of D2 and D1 is subsisting and remains F valid to this day. The plaintiff is no longer in a relationship with D2.

[10] The application by the plaintiff is strongly opposed by the defendants, which resulted in the defendants filing an application under O. 14A of the Rules of Court 2012 (ROC), to dismiss the OS on the grounds that, pursuant to the presumption of legitimacy under s. 112 of the Evidence Act 1950 G (EA), the fact that C was born during D1's valid marriage to D2 was conclusive proof that the child was the legitimate child of D2.

[11] At some point in time during the course of litigation, when the plaintiff was challenged that the application prayed for in the OS, may result in C to be illegitimate, the plaintiff amended his OS to remove a prayer H which seeks for the ratification of C's birth certificate in the event it was proven that he is the biological father of C.

[12] The High Court allowed the defendants' O. 14A application and summarily dismissed the OS.

I

Proceedings In The Court Of Appeal

[13] The judgment of the Court of Appeal is reported in *CAS v. MPPL & Anor* [2019] 2 CLJ 454; [2019] 4 MLJ 243 (hereinafter referred to as "*CAS 1*").

[14] The issue in the Court of Appeal in *CAS 1* was, to what extent does s. 112 of the Evidence Act 1950 (EA) apply, if at all, in a suit to determine paternity. In dealing with the said issue, it held that the High Court Judge erred on two points, namely;

(i) the conflation of the concept of legitimacy and paternity; and

(ii) the interpretation of the "best interest of C".

[15] The Court of Appeal held that paternity and legitimacy are separate issues. The former involves question of fact, whilst the latter is a question of law. Section 112 of the EA does not bar enquiries into paternity as it only involves legitimacy. It also held that the learned trial judge failed to consider the distinction between the two concepts of legitimacy and paternity. Hence, the fear and concern of the trial judge of illegitimising C was misplaced.

[16] On the issue of best interest of C, the learned trial court judge failed to consider in light of the right of C to know who her biological parents are.

[17] The Court of Appeal did not make further orders on the DNA test but held that the court needed to resolve the substantial factual disputes first, before such orders could be made. The defendants deny many of the allegations made by the plaintiff with regards to his purported relationship with D1 and C. The Court of Appeal found that these are crucial matters which warranted the amended OS to be converted into a writ action and hence remitted the matter to the High Court for a full trial for determination of the issue of paternity which were in dispute and were not addressed by the High Court.

The Federal Court Proceedings

[18] The defendants obtained leave to appeal to the Federal Court. However, having heard the appeal, the Federal Court affirmed the Court of Appeal's decision to the extent that the matter be remitted to the High Court for a full trial.

The High Court Trial Proceedings

[19] In the trial at the High Court, the issues that arose for determination were:

(i) whether there was sexual intercourse between the plaintiff and D1 before her marriage to D2 and during her marriage, especially around September 2007;

(ii) whether the plaintiff had access to the child after her birth until December 2013;

(iii) whether the plaintiff provided D1's maintenance for C until D1 closed her bank account; and

(iv) whether the court has the power to order a DNA test on C to determine whether the plaintiff was the biological father of C and, if so, ought such an order be made.

[20] In brief, the findings by the learned High Court Judge are as follows:

(i) to ascertain paternity, a man must first present a preliminary case demonstrating that he had sexual relations during the conception period of the child. This evidence should be supported by additional proofs to substantiate his claim as the potential biological father. Only after meeting these requirements can a court consider ordering a DNA test to determine the child's paternity. In this present case, C's birthdate is 23 June 2008, indicating that the conception likely occurred between 13 September 2007 and 20 October 2007;

(ii) during the trial of the writ action, D1 admitted to having had sexual relations with the plaintiff prior to her marriage with D2, which continued on during her marriage until January 2014;

(iii) the plaintiff, a pilot, and D1, a flight attendant, both worked for the same airline. D2, also a pilot, was employed by a different airline. During D1's testimony, she stated that she would meet the plaintiff when both of them were in the country, and D2 was away on his flight duties. Her clarification that D2 returned to Kuala Lumpur 'earlier in the month' of September and from 22 September 2007 indicated that there were several days during September 2007 when D1 and the plaintiff could have met and engaged in sexual intercourse. As these unaccounted days fell within C's conception period, it supported the plaintiff's claim of having sexual relations with D1, especially around September 2007;

(iv) the presented documents and photographs, along with various incidents, strongly suggested that D1 had informed the plaintiff that he was the father of C. These included invitations to the hospital after C's birth, visits to her matrimonial home, and statements made to the plaintiff's mother about his paternity. The photographs captured the plaintiff and D1 celebrating the child's first birthday, going on vacations, and spending time together with the child, indicating a close parental relationship. From the visuals, it was evident that the plaintiff played a fatherly role, while D1 acted as the child's mother. The evidence showcased the plaintiff's involvement in C's life from birth until D1 ceased his access to C in December 2013;

(v) the plaintiff claimed to have financially supported C from birth until D1 closed her bank account in August 2014. The defendants denied receiving any maintenance payments. During the trial, D1 admitted to receiving monthly deposits of RM1,000 from the plaintiff but asserted that it was for her personal use, not for C's maintenance. However, the defendants failed to provide evidence supporting their claims or showing that C's expenses were covered by D2. Consequently, the defendants could not meet their burden of proof, and the plaintiff successfully demonstrated that he had made maintenance payments for C into D1's bank account until it was closed;

(vi) the plaintiff established a case that he had sexual relations with D1 during the child's conception period, specifically in September 2007, making him a potential biological father. When D1 admitted to having sexual relations with the plaintiff during the same period, the question of C's paternity arose, leaving uncertainty between D2 and the plaintiff as potential fathers. To conclusively resolve the paternity question, a DNA test was necessary. Courts, acting as *parens patriae*, possess the authority to order a DNA test to determine C's true father;

(vii) it was in C's best interest to undergo a DNA test to determine her paternity.

[21] As a result, on 19 May 2021, the High Court allowed the plaintiff's application and ordered that C be brought to Hospital Tunku Azizah in Kuala Lumpur for the DNA test to be conducted in order to ascertain and confirm C's paternity.

[22] The High Court further ordered that in the event the DNA test showed the plaintiff to be the biological father of C then a declaration shall issue to confirm the same.

[23] The High Court also granted further ancillary reliefs as prayed for by the plaintiff in the statement of claim. Dissatisfied with the decision of the High Court, the defendants appealed to the Court of Appeal.

Proceedings In The Court Of Appeal ("CAS 2")

[24] The main issues that arose were:

(i) whether the plaintiff had made out a *prima facie* case that he had sexual relations with D1 during the period C was conceived ('conception period');

(ii) whether the High Court had the power to order a blood test on C to determine paternity *via* DNA testing; and

(iii) whether it was in C's welfare and best interests to order the DNA test.

[25] On 27 March 2023, the Court of Appeal unanimously dismissed the appeal, affirmed the order of the High Court and ordered that the parties bear their own costs. The Court of Appeal affirmed the findings of the learned trial judge that the plaintiff had proved on a balance of probabilities that:

(i) he had intimate sexual relations with D1 prior to and during her marriage to D2 until January 2014;

(ii) he had unprotected sexual intercourse with D1 during C's conception period, particularly in September 2007;

(iii) D1 had told him and his mother that he was the father of C;

(iv) he had access to and was involved in C's life since her birth until December 2013; and

(v) he had provided D1 monies for the C's maintenance until she closed her Maybank account sometime in August 2014.

[26] The Court of Appeal held that these were essentially findings of fact by the trial judge and an appellate court was slow to disturb such findings of fact unless it was shown that the trial judge was plainly wrong. The trial judge did not make any error in her findings that the plaintiff did have sexual relations with D1 during the conception period.

[27] The principle enunciated in the English cases of *In Re L* [1968] 1 All ER 20, and *B(BR) v. B(J) And Another* [1968] 3 WLR 566, *ie*, that the High Court as *parens patriae* has inherent jurisdiction and power to order a blood test of a child to ascertain paternity, is a rule of antiquity recognised in the common law. This common law principle is applicable in Malaysia by virtue of s. 3(1) of the Civil Law Act 1956, which allows for the import of the common law of England as at 7 April 1956, subject to the limitations spelled out in that statutory provision. This is to be read together with s. 24(d) of the Courts of Judicature Act 1964 (CJA) to support its exercise of its inherent power to act as guardian to C as a child.

[28] Thus, the COA concurred with the findings and ruling of the High Court Judge on the application of the common law principle that as *parens patriae*, the High Court had the general inherent powers over a child to make any order that would be in the best interest of the child, and that this would include the power to order that a child undertake a DNA test for the purposes of determining his or her paternity. In this regard, there was no reason to disturb that pronouncement of the law by the trial judge, and the COA affirmed it as the applicable law.

[29] The COA also concurred with the finding of the trial judge that following the Court of Appeal's pronouncement in *CAS 1*, the presumption of legitimacy in s. 112 of the Evidence Act 1950 does not bar inquiries into

the paternity of a child. It was in the best interests of a child to know his or her biological parents. The Court of Appeal was bound by the doctrine of *stare decisis* to apply that principle. The right of a child to know his or her biological parents is now internationally recognised as a basic right of critical importance to a child. The child has a right to know the truth of his or her origin, and in this regard, where appropriate, the High Court must exercise its inherent jurisdiction of *parens patriae* to assist the child to know that truth. Given the facts and circumstances of the case, this was such an appropriate case. The order of the High Court was therefore affirmed.

[30] The Court of Appeal granted stay of the order upon application by the defendants pending their application for leave to appeal in the Federal Court which resulted in the current appeal before us with the seven questions of law.

[31] The decision in *CAS 2* has the effect of affirming not just the decision of *CAS 1* but also the propositions of law in *CAS 1* and their application in the High Court trial.

The Present Appeal

Submissions By The Defendants

[32] Before us, the defendants submit that the distinction between legitimacy and paternity are no longer good law in light of new developments. It is the defendants' case that the Court of Appeal erred:

(i) in interpreting that the presumption under s. 112 can be rebutted without proving "no access";

(ii) when it held that the courts have the power under *parens patriae* to order a DNA test in light of conflicting case laws;

(iii) the "right to know" is not the paramount consideration for assessing C's interest and welfare, instead it should be approached in a holistic analysis in determining what is the best interest and welfare of C. This is especially so when the right to know in art. 7 of the United Nations Convention on the Rights of the Child (UNCRC) expressly reserved by the Malaysian Government as to its applicability in Malaysia; and

(iv) there is no existing national law which supports a child's right to know his or her biological parents.

Submission By The Plaintiff

[33] In gist, the plaintiff places great reliance on the decisions in *CAS 1* and *CAS 2*. The Court of Appeal did not err in its decision and in affirming the findings of facts by the High Court.

A **Analysis And Findings**

[34] Before we proceed with the analysis on the issues and the law, few matters have to be made clear at the outset.

[35] Firstly, the UNCRC only came into force on 2 September 1990. Hence, it is very unlikely that foreign cases decided before this date have considered the issue of a child's right to know of his/her biological parents.

[36] Secondly, none of the other common law jurisdictions considered in *CAS 1*, *CAS 2* or by the plaintiff and defendants have specifically made reservations to art. 7 of the UNCRC. To that extent, cases from these jurisdictions only have probative value on the matter that they consider "the right to know" in light of psychological welfare considerations.

[37] Thirdly, the plaintiff raised the issue of *res judicata* as *CAS 1* and *CAS 2* have dealt with the issue at hand. However, we are not persuaded by the plaintiff's argument in this respect because *CAS 1* specifically dealt with the need for a full trial in determining the factual dispute, whereas *CAS 2* dealt with the question of law, which is the appeal before us.

[38] Finally, it is safe to take judicial notice that the DNA test is a standard and accurate test in determining paternity and it has a high rate of accuracy to the extent of 99.9999% and has a high exclusion rate.

Question 1: Whether Legitimacy And Paternity Are Distinct Concepts Taking Into Consideration The Decision In Leow Fook Keong

[39] Parties went to great lengths to make submissions on whether the decision in "*CAS 1*", which establishes the principle that legitimacy and paternity are distinct concepts, is still good law.

[40] The stand by the Court of Appeal in *CAS 1* at para. [23] of the judgment, held that paternity and legitimacy are distinct concepts and therefore s. 112 of the EA does not bar enquiries into paternity. It conclusively presumes that a child, whose paternity is in question, is the legitimate child of the man to whom the mother was lawfully married at the time of the said child's birth. The Court of Appeal in *CAS 2* agreed with *CAS 1* that the presumption of legitimacy in s. 112 of the EA does not bar enquiries into the paternity of a child.

[41] As far as the law is concerned, s. 112 of the EA provides that, if a child is born during a marriage, or 280 days after the marriage is dissolved, and the mother remains unmarried, the husband shall be conclusively presumed to be the child's father. The only fact that can rebut this presumption is the lack of sexual access. Section 112 is only applicable where the legitimacy of a child is a fact in issue or relevant facts (see *Chua Kim Suan v. Ang Mek Chong* [1988] 3 MLJ 231). It is to be noted that nowhere in s. 112 of the EA is the word "paternity" mentioned.

[42] The keyword for paternity is "origin", whereas the core nature of legitimacy is encapsulated in the phrase "recognition". Paternity is determined factually, which is objective and descriptive by nature. On the other hand, legitimacy concerns recognition in law (and by extension society) which can be either descriptive or prescriptive in nature. Moreover, legitimacy is also relatively subjective to the concept of paternity when both concepts cross paths. Consequently, by its very nature, legitimacy is a question of law which cannot be severed from the perception of society, law, or factual determination.

[43] In construing s. 112 of the EA, the presumption essentially determined the legal father of the child. Hence, the question of paternity cannot be disassociated with the question of legitimacy of a child in such construction. Behind the policy to the presumption is the protection of the status of the child. By recognising the child as legitimate, the child is entitled to obtain financial benefits such as maintenance and child support, inheritance rights and other obligations from the father. Although the husband is not biologically related to the child, he is liable to maintain the same due to the child's legitimate status. Therefore, logically, if both concepts were to be treated in an entirely separate manner, the father in fact would not be able to exercise any rights in law pertaining to the child as the determination of such legal rights and obligation is rooted in the concept of legitimacy. In other words, these two concepts, though distinct, might give rise to overlapping situations.

[44] Taking the decision in *CAS 1* and *CAS 2*, the Court of Appeal is correct in determining that the nature of "legitimacy" and "paternity" are distinct, though interrelated. However, the main concern is the application and the operation of the distinction between the two concepts that ought to be examined in light of the effect of the interconnectedness of both concepts.

[45] In our present appeal, the alleged father, in fact (who has not yet established his paternity), seeks for, not only a declaration of his status as a biological father but also other orders relating to maintenance and access, which only persists in legitimacy. As the concepts are distinct, a collateral attack/challenge on legitimacy, should not be allowed. It is only in limited circumstances where it would be justified to leverage one concept over the other. *Leow Fook Keong* demonstrates the interconnectedness of legitimacy and paternity, which shows that a collateral attack on legitimacy is possible, although this was never the issue in that case. The concern of the defendants in the present appeal is that once the paternity is ascertained through the DNA test (if ordered by the court), there would be a collateral attack on legitimacy where the legitimacy of C may be affected and C may be bastardised in the event the plaintiff is found to be the biological father. Whereas the plaintiff argued that the concept of paternity and legitimacy are

A distinct and hence concluded that the legitimacy status of C would not be affected, even if paternity is ascertained, because the legal presumption under s. 112 of the EA stands.

[46] As question 1 referred to *Leow Fook Keong*, we will address the same. The Federal Court in *Leow Fook Keong* was confronted with the sole question B of whether, the National Registration Department is under a statutory duty to record the particulars of the natural father of an illegitimate child and/or to correct/amend/update such records, when evidence and undisputed facts are available. The Federal Court answered in the positive. Legitimacy was never an issue there, as the child was illegitimate at all times. Hence, s. 112 C of the EA has no application. The Federal Court merely required the National Registration Department to record the particulars of the natural father of an illegitimate child due to the availability of the DNA test and the court declaration order. The distinction between paternity and legitimacy was also never an issue.

D **[47]** *Leow Fook Keong* has no strong probative value as to what is meant by "father" or what is "true". Admittedly, while "true father" here could mean "natural father" or "father recognised in law", since the Registrar is concerned with birth, which is a question of fact, it should mean the true (scientifically proven) natural father. Be that as it may, this court in *Jabatan* E *Pendaftaran Negara & Ors v. Seorang Kanak-kanak & Ors; Majlis Agama Islam Negeri Johor (Intervener)* [2020] 4 CLJ 731; [2020] 2 MLJ 277, at para [88] has held that the information on the birth certificate is not conclusive evidence of legitimacy, but merely a true reflection of birth of the child.

[48] It is also logical to conclude that the information on birth certificates F can serve as a rebuttable *prima facie* indication of legitimacy.

[49] Essentially, the decision in *Leow Fook Keong*, in effect, gave a presumably legitimately born (under s. 112 of the EA) but not legally registered child (the "father" column being registered as 'maklumat tidak diperolehi') an accurate and legitimate father under operation of law. Noting G that the court is the final authority on questions of law, and legitimacy is a question of law, the courts can conclusively rule on the issue of legitimacy (subjected to art. 121(1A) of the Federal Constitution in regard to Syariah Courts). In other words, where a child is presumably legitimate in law (by virtue of s. 112 of the EA presumption) but unregistered, a party that can H show paternity, can use his paternity to rebut that presumption and establish both paternity and legitimacy in law as evident from the decision of *Leow Fook Keong*:

> [58] To leave the record of another man as the father of the child in that appeal in the face of uncontroverted evidence would be to lend legitimacy I to what was wholly false.

In other words, once there is the availability of the DNA report and the court's declaration, which ascertained the paternity of the child, surely, it does not stand to reason to still say that s. 112 of the EA presumption applies. The presumption is thus rebutted and must yield to proof.

[50] The Indian Supreme Court also adopted the same reasoning in *Nandlal Wasudeo Badwaik v. Lata Nandlal Badwaik* [2014] 2 SCC 576 when it held that:

> While the truth or fact is known, in our opinion, there is no need or room for any presumption. *Where there is evidence to the contrary, the presumption is rebuttable and must yield to proof. Interest of justice is best served by ascertaining the truth and the court should be furnished with the best available science and may not be left to bank upon presumptions*, unless science has no answer to the facts in issue.
>
> (emphasis added)

[51] Coming back to the appeal before us, there is a real possibility of a collateral attack on legitimacy, if the paternity of C is ascertained because there is an interconnectedness between the two concepts. The interconnectedness reacts differently when placed in different factual situations. This is especially true because while birth certificates are to reflect information of true biological parentage, the effect of documents such as birth certificate lends its hand to reflect legitimacy in both the factual and legal context.

[52] In the present appeal, paternity has yet to be ascertained. The birth certificate of C reflects that D2 is the father of C. C was born during the subsistence of the marriage between D1 and D2. The facts in the present appeal is a stark contrast to the facts in *Leow Fook Keong*. In *Leow Fook Keong*, the birth certificate stated "Maklumat tidak diperolehi". Further, there was already DNA evidence of paternity and a court declaration as such that ascertained paternity, whereas no such evidence is available in our present appeal.

[53] Moving on to the real possibility of paternity may affect legitimacy, the Court of Appeal in its "*CAS 1*" decision seem to have rightly identified the same:

> [27] We address first the argument by the defendants that a declaration of paternity has the effect of illegitimising a child. *This appears to be the legal conundrum created by s. 112 of the EA*.
>
> [28] Our law, and indeed the law of many civilised nations, recognises that a child *may in fact be an illegitimate child, but, by operation of the law, the said child may still be considered legally legitimate. We seek to illustrate this point*.
>
> (emphasis added)

[54] The Court of Appeal in *CAS 1* seem to use the word "illegitimate in fact" interchangeably with the concept of paternity. This approach would seem to open up the possibility of a collateral attack on legitimacy.

[55] Thus, a biological father to someone does not automatically mean that he is the father of the child recognised in law. In other words, to enjoy the recognition of the law, a cloak of legitimacy must be layered upon the factual determination of biological parentage. In regard to this, one must also note that the presumption under s. 112 of the EA provides such a cloak that presumes that a father in a lawful marriage is both the biological and legal father of the child. Thus, it does not seem right to us that, that cloak can be purported to be shared with a third party as of right, regardless of whether the third party is the biological father of the child, much less when the third party is unsure and unable to prove his purported paternity. There must be something more to justify doing so.

[56] Therefore, one would logically think that to allow for legal rights, benefits and obligation to flow from a mere determination of biological paternity, as in the reliefs sought by the plaintiff, in our present appeal, would be to allow a collateral attack on a child's legitimacy. The plaintiff in the reliefs prayed for, seeks to assert that he is the biological father (a right flowing from paternity) and his purported entitlement to establish contact with the child and pay maintenance to the child (which are rights flowing from legitimacy). However, the existence of a legal distinction between paternity and legitimacy would bar the plaintiff from claiming remedies associated with legitimacy as of right.

[57] Therefore, even where paternity can be proved, the High Court's order as reproduced below would result in rights and obligation that only arises from legitimacy, to also flow from the establishment of paternity:

> 2. if the results of the DNA test show that the plaintiff is the biological father of child C, the following orders be made:
>
> 2.1. a declaration that the Plaintiff is the biological father of the child;
>
> 2.2. the Plaintiff and the 1st Defendant and/or the 2nd Defendant shall appoint, within 21 days of the DNA test results or such longer period as mutually agreed by the parties, a qualified child psychologist with experience in the disclosure of the biological origins/parents of children, to advice and guide the parties as to how to reintroduce the Plaintiff into Child C's life and his access to Child C;
>
> 2.3. if the parties cannot agree on the appointment of the child psychologist with the said 21 days or the mutually agreed period, either the Plaintiff or the Defendants may apply to this Court for the appointment of such suitably qualified and experience child psychologist; and
>
> 2.4. the **Plaintiff is at liberty to apply for further orders relating to his access to Child C and the method of payment of maintenance for Child C upon receipt of the advice and guidance of the child psychologist**.
>
> (emphasis added)

[58] Consequently, if the plaintiff seeks to establish more than a factual relationship with C, he must necessarily satisfy the law relating to legitimacy, which in this case is the exception of "no access" between the defendants during the course of their marriage. It is not sufficient for him to say that he had a sexual relationship with D1 on the balance of probabilities, or even show that he is the biological father of C, as this would not only open the floodgates of litigation but also cause a fracture to the integrity of the family unit.

[59] With that in mind, it is to be noted that the true objective of this appeal is whether a DNA order to ascertain paternity is to be ordered. Mere suspicion on the balance of probability that a child could be the issue of another man should not be sufficient reason to seek assistance from the courts to order a DNA test, which might potentially breach that layer of legal protection.

[60] To conclude and answer the first question, we are of the view that both concepts are distinct, but not entirely separate. They are interrelated and because of their interconnectedness, there is a bridge between both concepts, where the consideration of one concept can affect the other.

[61] Hence, we cannot answer question 1 with a positive or negative because of the manner the question is framed. We decline to answer question 1.

[62] The facts of the case of *Leow Fook Keong* demonstrate a situation where both concepts can cause a legal conundrum. It demonstrates a real danger that a determination of paternity can open up the door for a challenge against legitimacy. Each case has to be determined on its own merits.

Question 3: What Constitutes "No Access" Under Section 112 Of The EA

[63] Since questions 2 and 4 are related, we would deal with question 3 first.

[64] The issue of "no access" was never raised as an issue in the High Court or the Court of Appeal. We, therefore, decline to answer question 3.

Questions 2: Whether Section 112 Of The Evidence Act 1950 Apply, Even Where There Is Scientific Evidence Available That The Said Child Is The Biological Child Of Another Male?

Question 4: Whether Section 4(3) Of The Evidence Act 1950 Bars The Court From Making An Order For DNA Testing For The Purposes Of Rebutting The Conclusive Proof Where Section 112 Of The Evidence Act 1950

[65] At this juncture, we turn to examine the statutory effects of s. 112 of the EA and s. 4(3) of the same. For clarity, we reproduced the provisions:

A Section 112

The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be **conclusive proof** that he is the legitimate son of that man, unless it can
B be shown that the parties to the marriage had no access to each other at any time when he could have been begotten.

Section 4(3):

4(3) When one fact is declared by this Act to be **conclusive proof** of another, the court shall, on proof of the one fact, regard the other as
C proved, and **shall not allow evidence** to be given for the purpose of disproving it.

(emphasis added)

[66] Questions 2 and 4 are essentially consecutive questions that require an
D examination of the nature of s. 112 of the EA and whether that nature bars an attempt at inquiring actual biological paternity.

[67] This relates to the application of evidential constructs (such as s. 112 of the EA), other indicators that might fall outside of legal proceedings (such as the indicator that rebuts the *prima facie* information in the birth certificate)
E and other consideration, related to the child's best interest.

[68] The defendants submitted that s. 112 of the EA only protects legitimacy to the extent of judicial proceedings pursuant to s. 2 of the same but does not apply to prevent a *de facto* usurpation of C's legitimate status. For clarity, we reproduced s. 2 of the EA which reads:

F Section 2. This Act shall apply to **all judicial proceedings in or before any court, but not to affidavits presented to any court or officer nor to proceedings before an arbitrator**.

(emphasis added)

[69] This contention rests on the observation that, legitimacy operates
G within the legal sphere and the social (or *de facto*) sphere. We have not found any authorities that make a systematic analysis of that distinction. Nevertheless, both the cases of *Leow Fook Keong* and *Nandlal Wasudeo Badwaik* have in the effect of their judgments demonstrated the same.

[70] The Federal Court in *Leow Fook Keong* made the following
H observation:

With that declaratory order of court, the 'maklumat' or information on the identity of the father of the child is now undisputedly available; that the appellant is the biological father of the child. **We further understand that the appellant has maintained regular access to the child as was first**
I **granted to him by the High Court** under the Guardianship of Infants Act 1961 (Act 351). **The child is fully aware that the appellant is his biological father**.

(emphasis added)

[71] It would appear that in *Leow Fook Keong*, this court decided that there was no such bar because on the facts, there was no evidence of the legitimate father (under the presumption of legitimacy) in the documentary evidence (*ie*, birth certificate) prior to the declaration of paternity. In addition, this court at para [68] of *Leow Fook Keong* also considered elements related to the best interest of the child.

[72] The Supreme Court of India in *Nandlal Wasudeo Badwaik* essentially held, "While the truth or fact is known ... there is no need or room for any presumption. Where there is evidence to the contrary, the presumption is rebuttable and must yield to proof. Interest of justice is best served by ascertaining the truth and the court should be furnished with the best available science and may not be left to bank upon presumptions, unless science has no answer to the facts in issue."

[73] Consequently, we hold the view that whether scientific evidence can rebut a conclusive evidential proof must meet in the middle and strike a balance with the child's best interest at its core, in matters that concern children in any event. Indeed, the best interest of a child has become the primary consideration as it reflects Malaysia's international obligation under the art. 3(1) of the UNCRC, which states:

> In **all actions** concerning children, whether undertaken by public or private social welfare institutions, **courts of law, administrative authorities or legislative bodies,** the **best interests of the child shall be a primary consideration**.
>
> (emphasis added)

[74] We are persuaded by the defendants' submission that as an evidential construct, the presumption in s. 112 would not automatically grant protection to the status of legitimacy in the context of judicial proceedings. This is because of the uniqueness of the facts in family law cases (as in *Leow Fook Keong*), which has the potential to alter substantive rights, the importance of considering the best interest of C becomes more apparent.

[75] In fact, since there is a high chance that s. 112 of the EA would not protect C's legitimacy outside of judicial proceedings, C's best interest once again become the focus of this present appeal. Even in the context of judicial proceedings, there would still be the situation where legitimacy can be challenged (directly by showing "no access"; or by other direct operation of law; or indirectly by collaterally demonstrating paternity and the child's best interest considerations concurrently). Such challenges would also prompt an inquiry as to the aftermath on any determination on the point of law in this appeal.

[76] Therefore, in cases concerning children, the aftermath of an order must be assessed against the future of the child. That is, the interest of the child must be considered. This is especially in light of the very likely fact that s. 112 of the EA is an evidential construct and cannot afford protection to C beyond the court proceedings.

[77] In terms of the law, the presence of the phrase "conclusive proof" in s. 112, begs the question as to the effect of the order of events have, in relation to s. 112, when read together with s. 4(3) of the EA. In the plain language of s. 4(3), the provision ensures that "the court shall, on proof of the birth from a valid marriage, regard legitimacy also as proved", and "shall not allow evidence to be given for the purpose of disproving legitimacy in law" (save for evidence adduced to show "no access").

[78] We find it helpful to consider the pronouncement in *Tenaga Nasional Bhd v. Evergrowth Aquaculture Sdn Bhd & Other Appeals* [2021] 9 CLJ 179; [2021] MLJU 1742 on "conclusive proof" as a starting point:

> [68] A presumption as defined by Thayer is "*a rule of law that court and judges shall draw a particular inference from a particular fact or from a particular piece of evidence unless and until the truth of such inference is disproved*" (see: James B. Thayer, *Presumptions and Law of Evidence*, Vol. 3(4) H. Law Rev., 141 (1889), at 154). According to Sarkaria J in *Syed Akhbar v. State of Karnataka* AIR [1979] SC 1848; 1853, presumptions are of three (3) types:
>
> (i) Permissive presumptions or presumptions of fact, (subsection 4(1) of the Evidence Act 1950 ("EA 1950"));
>
> (ii) Compelling presumptions or presumptions of law (rebuttable) (subsection 4(2) of the EA 1950); and
>
> (iii) Irrebuttable presumption of law or "conclusive proof" (subsection 4(3) of the EA 1950).
>
> [69] Generally speaking, presumption of facts are those inferences which are naturally and logically derived on the basis of experience and observations in the course of nature or the constitution of the human mind or springs out of human actions. These presumptions are in general rebuttable presumptions. Presumptions of law are those inferences which are said to be established by law. It can be subdivided into rebuttable presumptions of law and irrebuttable presumptions of law. Rebuttable presumptions of law are those presumptions of law which hold good until they are disapproved by evidence to the contrary. *Irrebuttable presumptions of law are those presumptions of law which are held to conclusive in nature. They cannot be overturned by any sort of contrary evidence however strong it is.*
>
> (emphasis added)

[79] It appears that "conclusive proof" in s. 112 bars the admissibility of scientific evidence to prove paternity of child born out of wedlock. It cannot be admitted to prove paternity of child born within a valid marriage based on s. 112 of the EA. The presence of the phrase "conclusive proof" in s. 112 bars admissibility of this evidence. The phrase 'conclusive proof' is also engaged in s. 4(3) of the EA to indicate that when the presumption uses the phrase, the court is not allowed to admit evidence to rebut the presumption. Although the presumption is a procedural tool, the effect of the phrase is

substantive in nature. The only rebuttable facts allowed by the provision and can be admitted by the court is evidence of "no access" between husband and wife. It is therefore clear that this is conclusive in terms of legitimacy so long as access between the married couple is present. The "no access" exception is logically the only premise in which existence of proof for "no access" can be adduced. The burden is upon the party who asserts non-access and cogent and convincing evidence must be adduced to prove this fact. Confessions of parties are insufficient to rebut the presumption.

[80] We must restate that legitimacy in law, as opposed to social (*de facto*) legitimacy, necessarily has a prescriptive element. In other words, the court must be aware that legitimacy in law would prescribe rights and benefits that are unique to legitimacy in law. Therefore, s. 4(3) of the EA serves as a bar to effectuate a safeguard against any potential challenge to conclusive proof, which in this case is proof of legitimacy. Logically, that bar can only be lifted under the "no access" exception discussed previously.

[81] Therefore, as we accept the defendants' submission on the point that since C is born into a valid marriage between the defendants, and there was no evidence to show that the defendants did not have access to each other, the conclusive presumption of legitimacy is still in place at this point in time.

[82] Following this reasoning, the plaintiff is attempting to obtain a DNA test with the help of the court where legitimacy has been proven. The balance does not fall in favour of the plaintiff merely because he can show that, on the balance of probabilities, he had an adulterous affair with D1. This is because the matter now falls under the ambit of "judicial proceedings" pursuant to s. 2 of the EA and the defendants have the benefit of a very strong presumption.

[83] Moreover, the vital factor in this appeal is that there is already a registered legitimate father for C, recognised in both the social and legal sphere, who has *de facto* custody over C, unlike the facts in *Leow Fook Keong*. Hence, we are not persuaded that there exists an overriding consideration to support a rebuttal of s. 112 at the stage of the plaintiff making his application.

[84] In any event, this analysis might be different if the plaintiff had already conducted a DNA test after communicating with the defendants or C before seeking a declaration.

[85] Therefore, on this point, it is our judgment that the defendants are correct to say that the presumption under s. 112 must first be dislodged by way of showing "no access" before a DNA test can even be considered.

[86] On question 4, we would answer in the positive. In our considered view, the provision of s. 4(3) of the EA bars any order for DNA testing for the purposes of rebutting s. 112 of the EA. It is meant to bar challenges to

A legitimacy with very little exceptions, and completely bars any party not falling under the ambit of the exceptions from seeking the court's assistance to challenge the presumption.

[87] As far as question 2 is concerned, it is not premised on the facts of the case, namely there is no DNA test available to rebut the presumption under
B s. 112. The plaintiff is seeking the court's help to compel the DNA to be done which is in stark contrast to the facts of *Leow Fook Keong* and *Nandlal Wasudeo Badwaik*.

[88] Hence, we decline to answer question 2.

C *Question 5: Whether Court Can Compel A DNA Test*

[89] There are arguments against the judicial power to force persons to have their blood tested against their wishes.

[90] Firstly, the issue of being forced against one's own interest. This is
D premised on the principle that one should not provide one's adversary with the evidence for his case as observed by Lord Thompson in *Whitehall v. Whitehall* [1958] SC 252 at pp 258-259:

> It seems to me to be going beyond our accepted methods and to offend the principles of fairness on which our system is based to compel a party
E to a litigation, let alone a stranger to the litigation, to be subjected to a surgical operation with a view to providing material on which the opposite party hopes to build up his case. This is an invasion of private right which is not consonant with our present methods. It goes far beyond the limited assistance which the Court is in a position to give to a party to get access to certain types of documentary or real evidence.

F **[91]** There is also the common concern raised in *Lee Lai Ching v. Lim Hooi Teik* [2013] 4 CLJ 107 and *Peter James Binsted v. Jevencia Autor Partosa* [2000] 2 CLJ 906 on the invasiveness of a DNA test on the body of persons:

> *In the case of a DNA test, it is common knowledge that either a blood, tissue or bone specimen will be taken from the person for testing*. If a person refuses to submit
G himself to such a testing he is perfectly entitled to do so; *a person cannot be subject to hurt (ie, suffer bodily pain, disease or infirmity) within the meaning of s. 319 of the Penal Code against his will by submitting himself to such testing*. Whoever carries out such testing without the person's consent would violate s. 323 of the Penal Code for voluntarily causing hurt to the person
H and a court cannot, in the absence of a specific legislative provision, order such person to submit himself to an unlawful act to be committed on his person.
>
> (emphasis added)

[92] Secondly, on the issue of the jurisdiction and power of courts, which
I are conferred by art. 121(1) of the Federal Constitution. The High Courts and the inferior courts shall have jurisdiction and powers as may be conferred by Federal Law. As far as legislations are concerned, there appears to be no

specific written statutory provision or common law providing for power to the courts to order any person, be it an adult or a child, to undergo a DNA test in civil proceedings.

[93] The learned High Court Judge in considering statutory provision with regards to power to order DNA test, relied on the DNA Act (para. 226 of her judgment). However, the DNA Act provides powers limited to criminal proceedings only (refer to *Peter James Binsted v. Jevencia Autor Partosa* [2000] 2 CLJ 906; *Lionel Lau Siang Kok v. Datuk Seri Panglima Lau Chon* Kun [2013] 1 CLJ 619). Even so, the consent of the person is required before DNA samples can be taken in criminal proceedings.

[94] Similarly, the reference by the learned High Court Judge to the Federal Court case of *Pathmanabhan Nalliannen v. PP & Other Appeals* [2017] 4 CLJ 137 on the admissibility of DNA evidence as expert evidence, specifically referred to criminal proceedings. Her Ladyship in the High Court also referred to the case of *Peter James Binsted*, where it held that there is no power in Malaysia to order a person to undergo a paternity test. At the same time, Her Ladyship addressed the diverging views in the High Court, namely the judgment of Zamani Rahim J in the High Court case of *Lee Lai Ching v. Lim Hooi Teik* [2013] 4 CLJ 107 and the judgment of *Lee Lai Cheng (Suing As The Next Friend Of Lim Chee Zheng And Herself) v. Lim Hooi Teik* [2017] 6 CLJ 668, where the High Court in the former case held that there was a power to order a DNA test pursuant to the inherent power of the court under O. 92 r. 4 of the ROC, whereas in the latter, it was held that there was no power to order a DNA test, despite the plaintiff's mother had proven that, on a balance of an probabilities, there was, intimate relationship with the defendant's father. However, Her Ladyship failed to consider the cases referred to, by the defendants, which is, the Court of Appeal case of *Lionel Lau Siang Kok v. Datuk Seri Panglima Lau Chon Kun* [2013] 1 CLJ 619 which affirmed the decision of the High Court in *Peter James Binsted* that there is no power under the statutory provision or common law for the court in Malaysia to order any person to undergo a DNA test to ascertain paternity.

[95] The Court of Appeal in turn relied and affirmed the High Court judgment and failed to consider *Lionel Lau* [2013].

[96] Next is the issue of the inherent powers of the court. Can that power be utilised as empowering the court to order for DNA testing on individuals in civil cases. In this regard, O. 92 r. 4 of the ROC confers upon the courts the inherent jurisdiction and power to prevent injustice or to prevent abuse of the process of the court. However, this provision is only to prevent procedural injustice (refer to the Federal Court case of *Stone World Sdn Bhd v. Engareh (M) Sdn Bhd* [2020] 9 CLJ 358). It cannot be utilised to invoke or facilitate a substantive right, which is not provided for, *albeit* unjustly denied. It is not a substantive law empowering the grant of substantive orders, as in DNA testing. The learned High Court Judge misdirected herself

when Her Ladyship referred to the Indian Supreme Court decision in *Sharda v. Dharmpal* [2003] 4 SCC 493 to support the proposition that the court has inherent power under O. 92 r. 4 of the ROC (which is in *pari materia* to s. 151 of the Indian Civil Procedure Code 1908) to order DNA testing in paternity cases. *Sharda v. Dharmpal* concerned a petition for divorce on the grounds of unsoundness of mind of the respondent. The issue therein was whether a matrimonial court has the power to direct a party to undergo medical examination. The order for a medical examination to ascertain whether the respondent was of sound mind was made not pursuant to the court's inherent power under s. 151 of the Indian Code of Civil Procedure 1908 to ensure justice to the parties, but to its requisite power under s. 75(e) of the Indian Civil Procedure Code 1908 to issue a direction to hold scientific, technical or expert investigation. We do not have such similar provision in our ROC 2012 nor in the Evidence Act 1950. Such power to order investigations into a person's DNA must be sourced from specific legislation.

[97] Therefore, the COA in *CAS 2* erred in law when it upheld the High Court judgment that O. 92 r. 4 of the ROC can be the source of the court's power to order DNA testing, which is a substantive order affecting the substantive rights of parties.

[98] The defendants' stand is that there was no English case that had ordered blood test to determine paternity pre-7 April 1956 – which is the cut-off date statutorily provided for the applicability of the common law of England and rules of equity under s. 3(1)(a) of the Civil Law Act 1956. The learned trial judge however, disagreed and held that the common law of England on 7 April 1956 empowers the courts as *parens patriae* to make any order as may be appropriate for the best interest and welfare of the child. In making this ruling, the court referred to *Re Spence* [1847] 41 ER 937. However, in *Re Spence*, there was no issue of the blood test before the court and hence it was never considered by the court. The case only recognised the court's role as *parens patriae* to make orders appropriate for the best interest and welfare of the child.

[99] In India, the Supreme Court recognised that there is no statute, be it the Criminal Procedure Code, or the Evidence Act, permitting the ordering of a blood test of any individual. In the often-cited case of *Goutam Kundu v. State Of West Bengal And Another* [1993] 3 SCC 418, the Supreme Court had rejected the application for blood test to be conducted on a minor child to determine paternity. It was held that:

(1) that courts in India cannot order blood test as a matter of course;

(2) wherever applications are made for such prayers in order to have a roving inquiry, the prayer for blood test cannot be entertained;

(3) there must be a strong *prima facie* case in that the husband must establish non-access in order to dispel the presumption arising under s. 112 of the Evidence Act;

(4) the court must carefully examine as to what would be the consequence of ordering the blood test; whether it will have the effect of branding a child as a bastard and the mother as an unchaste woman;

(5) No one can be compelled to give sample of blood for analysis.

The Supreme Court discussed at length on the rationale for adopting such an approach, namely the stigma of illegitimacy is very severe and India has no protective legislations as in England to protect illegitimate children. In addition, "the court exercises protective jurisdiction on behalf of an infant ... it would be unjust and not fair either to direct a test for a collateral reason to assist a litigant in his or her claim".

[100] This approach was later emphasised by another Supreme Court decision in *Bhabani Prasad Jena v. Convenor Secretary, Orissa State Commission For Women And Another* [2010] 8 SCC 633, which held that the order directing a DNA test to ascertain paternity is considered to be a delicate and sensitive aspect and should only be ordered when the same is most eminently required. Such an order may be directed to conclusively determine paternity only when there is a strong *prima facie* case in favour of the person seeking such a direction.

[101] A much recent decision was the case of *Aparna Ajinkya Firodia v. Ajinkya Arun Firodia* [2023] SCC On Line SC 161, which dealt with the issue of a wife's infidelity and not the child's legitimacy, where the High Court recorded a caveat to the order for DNA test, giving the mother the liberty to comply with the order requiring a DNA test or to disregard it, with an adverse inference drawn against her. However, on appeal, it was held that the order for the DNA test cannot be ordered for the purpose of proving adultery and no adverse inference could be drawn against the wife for her refusal to subject the child to such a test.

[102] Thirdly, the presumption of legitimacy has proven to be one of the most restraining elements in the UK and Scotland, in making an order against an individual for a blood test.

[103] Given the aforesaid, we would answer question 5 in the negative.

Question 6: Extent Of The Court's Role As *Parens Patriae*

[104] The issue of the court's power to order a blood test on children first arose in England in the English Court of Appeal case of *In Re L* [1968] 1 All ER 20. Wilmer J observed that the power to order a test of a child's blood did not apply where paternity is the issue. He confined his judgment with regards to the court's power to order a test of a child's blood to cases arising, as in this case, within the court's custodial jurisdiction.

[105] In this regard, in cases involving paternity disputes, the interest of the disputing parties are not the only ones before the court. The whole concept and practice of the old court of Chancery of England, is as *parens patriae* in relation to children is implied recognition that the real interest determinable by the courts is not that of the actual parties to the dispute but rather that of the child. Thus, equity and statute make the interest of the child as the paramount consideration.

[106] The jurisdiction of *parens patriae* is an ancient Roman concept which has seen its application in English Common Law pertaining to children as early as 1700. The seminal case of *Eyre v. Countess Of Shaftsbury* (1558-1774) All ER Report 129 which stated:

> The King is bound of common right and by the laws to defend his subjects, their goods and chattels, lands and tenements, and by the law of this realm, every loyal subject is taken to be within the King's protection, for which reason it is that idiots and lunatics, who are incapable of taking care of themselves, are provided for by the King as *pater patriae*, and there is the same reason to extend this care to infants.

[107] This specific jurisdiction had been applied to almost all common law jurisdictions and Malaysia is no exception as reflected in the judgment of Raja Azlan Shah CJ in the case of *Mahabir Prasad v. Pushpa Mahabir Prasad* [1981] CLJ 124A; [1981] CLJ (Rep) 65; [1981] 2 MLJ 326, where His Lordship held that:

> This jurisdiction has its source in the relationship between the Crown (acting through the Courts) and its subjects who owe allegiance to the Crown, and to whom the Crown offers its protection, observing special obligation as *parens patriae* to minors. All Malaysian minors are wards of court because they are subject to the parental jurisdiction entrusted to the courts.

[108] Both parties in the present appeal agreed that *parens patriae* jurisdiction is for the benefit and protection of the infants. It is a well-known common law jurisdiction which also manifests itself in s. 24(d) to (f) of the Courts of Judicature Act 1964:

> (d) jurisdiction to appoint and control guardians of infants and generally over the person and property of infants;
>
> (e) jurisdiction to appoint and control guardians and keepers of the person and estates of idiots, mentally disordered persons and persons of unsound mind; and
>
> (f) jurisdiction to grant probates of wills and testaments and letters of administration of the estates of deceased persons leaving property within the territorial jurisdiction of the Court and to alter or revoke such grants.

[109] Counsel for the defendants in support of such proposition referred to the case of *B(BR) v. B(J) And Another* [1968] 3 WLR 566, where Sach LJ said in his judgment that:

> Prominent to my mind is the fact that it is essential to remember that the *parens patriae* jurisdiction is one for the benefit and protection – I emphasise the words "and protection" – of the infant; and that it, it must be emphasises, can be something very different from the self-centred interests that adults may have in sorting out their own affairs.

It is to be noted that in both *In Re L* and *B(BR) v. B(J)*, the issue was whether the child is the legitimate child of the husband or will become the legitimated child of the other man by reason there was to be subsequent marriages between the mother and the other man. There was no issue of the child being bastardised.

[110] Thus, when the law deals with children, the welfare and interest of the child has to be considered as one of the prime considerations. In line with this proposition, Malaysia had ratified the UNCRC under which the Government did not make any reservation to art. 3 of the Convention which states:

> 1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.
>
> 2. State Parties undertake to ensure the child such protection and care as is necessary for his or her well-being ...

[111] The reasoning of His Lordship Raja Azlan Shah Ag LP in *Mahabir Prasad*'s case explained that in cases which involve the custody of infants, the High Court is empowered with an inherent jurisdiction which is derived from the Crown's prerogative power as *parens patriae*.

[112] Shankar J in *W v. H* [1987] 2 MLJ 235 at p. 237, in referring to s. 24(d) of the CJA (which provides that the civil jurisdiction of the High Court shall include the jurisdiction to appoint and control guardian of infants and generally over the person and property of infants), stated that this jurisdiction has its source in the relationship between the Crown (acting through the courts) and its subjects, who owe allegiance to the Crown and to whom the Crown offers protection, observing a special obligation as *parens patriae* to minors.

[113] It is trite that there is a wide and all-encompassing ambit of the *parens patriae* jurisdiction to make any order necessary for the protection of a child. The primary consideration is acting in the best interest of the child's welfare.

[114] While the court's role as *parens patriae* is recognised, this role, when overriding the parent's wishes, must be exercised within the jurisdiction allowed by the law and in accordance with the power conferred upon the courts by our written law or the English Common Law pre the cut-off date of 7 April 1956 as provided in s. 3(1)(a) of the Civil Law Act. Before the cut-off date, none of the English cases, where paternity issues were raised in relation to the child of a marriage, had ordered blood test to be carried out to ascertain paternity. Instead, the English Courts relied on the common law of presumption of legitimacy which essentially, is to protect children from being bastardised by any person who seeks to challenge their paternity (see *Watson v. Watson* [1953] 3 WLR 708; *Cotton v. Cotton* [1954] 2 WLR 947). The English cases relied upon by the learned trial judge in her judgment were all post the cut-off date of 7 April 1956.

[115] It is clear in this case that the subject matter to be protected is the interest of C and C alone the interest of other parties are irrelevant considerations for the purpose of invoking this jurisdiction.

[116] Hence, the plaintiff must show to the court, as to how an order for a DNA test would protect the interest and welfare of C. If it were the case that C does not have parents to provide for her or that C being under the custody of the defendants would cause C to be severely impacted negatively, then there would be strong protective reasons for a court to make a DNA order to determine C's paternity.

[117] While our courts have jurisdiction on matters involving infants under s. 24(d) of the Courts of Judicature Act 1964 (CJA), it must derive its power from written legislation as provided under s. 25 of the CJA to make orders in the best interest of children under our written law.

[118] Absent of such power conferred upon the court by written law, it cannot derive self-made power from its role as *parens patriae* from the mere fact that it has jurisdiction over children. Jurisdiction and powers are two separate concepts. Jurisdiction does not confer power (judgment of Thomson CJ in *Lee Lee Cheng (F) v. Seow Peng Kwang* [1959] CLJU 107; [1959] 1 LNS 107; [1960] 1 MLJ 1).

[119] As of now, there is no written law in Malaysia which confers power to the courts to compel DNA test in civil proceedings, be it an adult or a child.

[120] The Court of Appeal in *CAS 1* and *CAS 2* relied on English and Indian cases to support the proposition that the courts have the power to compel children to be subjected to DNA testing. However, the Court of Appeal failed to appreciate the rationale for the decisions in those jurisdictions where they have the legislative backing in making such order to direct DNA testing, which in Malaysia, there is none.

[121] In the UK, there are specific provisions regulating the taking of DNA samples of both adults and children to determine paternity in civil proceedings *eg*, s. 20 of the Family Law Reform Act 1969 which empower the courts to direct blood tests in any civil proceedings to determine parentage.

[122] In Singapore, in addition to the courts having jurisdiction "generally over the person and property of infants" under s. 17(d) of the Supreme Court of Judicature Act (which is in *pari materia* to our s. 24(d) of the CJA), Singapore saw it fit to amend their Evidence Act including s. 114 (which pre amendment, is in *pari materia* to our s. 112) to allow for a rebuttable presumption of paternity and to add s. 47(1) of their Evidence Act 1893 for admission of scientific evidence. Before these amendments no DNA test was ordered.

[123] Whilst in India, an amendment was made to s. 75(e) of the Indian Code of Civil Procedure 1908 and O. 26 r. 10A to provide their courts with the power to issue a direction to hold scientific, technical or expert investigation in civil proceedings. Such provision is absent in our legislations.

[124] Therefore, for the Court of Appeal to say that our courts have similar power to order a DNA test in civil proceedings is clearly not supported by any statutory provisions.

[125] The plaintiff's counsel seeks to rely on the general provisions regarding the court's jurisdiction in the CJA and procedural rule in the ROC to seek the enabling power to do so. In this regard, it is pertinent to observe that the Legislature saw it fit to provide for the DNA Act which only deals with the taking of DNA samples in criminal proceedings only. There is no provision for the taking of DNA samples for purposes of civil proceedings.

[126] Section 24(d) of the CJA only provides the courts the jurisdiction generally over the person and property of infants; that section does not provide with any enabling power to the courts to order DNA testing. Order 92 r. 4 of the ROC provides inherent power to the courts to ensure procedural justice but it does not provide with substantive rights and neither can it be utilised as a limitless source of power to make orders affecting substantive rights.

[127] We are not persuaded by the plaintiff on the submissions regarding the wide powers vested in the court under s. 25(2) read with para. 1 of the Schedule to the Courts of Judicature Act 1964, as support that gives the court the power to order DNA test on a child. This argument by the plaintiff is flawed as the provision only deals with powers of the court to grant public law remedies in relation to the enforcement of any legal right in the performance of any legal duty.

[128] In support of the court's additional powers under s. 25(2) and para. 1 of the Schedule CJA, the plaintiff further relied on the case of *Majlis Peguam & Anor. v. Tan Sri Dato' Mohamed Yusoff Mohamed* [1997] 3 CLJ 332 to illustrate the almost unfettered powers of the High Court. However, that case was specifically in relation to para. 8 of the Schedule to the CJA, which provides for power to enlarge or abridge time prescribed by any written law for doing any act or taking any proceeding. The judgment therein has no relation to para. 1 of the Schedule to the CJA. It was held that the powers conferred under para. 8 of the CJA can be exercised even in the absence of another statute as the provision itself is power-conferring in light of its expressly clear and plain wording namely, that the court has the power "to enlarge or abridge the time prescribed by any written law for doing any act or taking any proceedings".

[129] The power-conferring words from the paragraphs in the CJA Schedule are plain and unambiguous in conferring power to do the express acts sought. Applying this to the facts in the present appeal, clearly there is nothing in the CJA conferring such power to the courts to compel the DNA test to an adult or a child.

[130] Indeed, while the power vested in the High Court is wide, it must still be exercised in accordance with law, as there is no such thing as "unfettered powers" in matters of law. Thus, such power to compel DNA testing must be derived from written law as was done in other jurisdictions.

[131] Therefore, the wide powers under *parens patriae* are to be exercised in a protective capacity restrictively and the plaintiff has not shown from what harm would C be protected from, if a DNA order were to be granted. In any event, the plaintiff cannot show that there would be an abuse of court process in the event a DNA order is not ordered. The facts and circumstances of the present appeal does not show that such a test is imminently needed (refer to para. 10 of *Babu Remyalayam Veettil v. Vidya d/o Santhini Kalathinte Padeetthathil Veettil* (OP(FC) No. 507 of 2014). It is thus correct to say that in rare and pressing circumstances that might call for it, the courts have the general power to order a paternity test. This would go into the fact situation of each case. It must be noted that while the plaintiff's action for a declaration is a proceeding and a DNA order would facilitate and assist the court in determining paternity, the focus of this case still lies in the substantive rights of C and not the plaintiff. In other words, the balance of the scale does not seem to tip towards the plaintiff as the plaintiff had not shown why his procedural right to enforce a paternity inquiry (right to know) would outweigh the interest of C.

[132] On question 6, we accept that the jurisdiction and powers associated with *parens patriae* can be circumscribed by statutory provisions and s. 3(1) of the Civil Law Act 1956 where applicable. However, in the absence of a specific statute which prohibits the granting of a DNA order, we do not see how these should limit the court's protective power.

[133] In regard to the implication and application arising from the answers above, we are of the opinion that the plaintiff is unable to invoke the protective jurisdiction of *parens patriae* as he has not shown anything serious in which C needs protecting from. Furthermore, the inherent powers of the courts would not have an appropriate ground to be invoked as the plaintiff has not shown any procedural impropriety that might arise from a failure to grant the DNA order sought.

[134] The answer to question 6 is in the positive.

Question 7: The Right of A Child To Know His/Her Biological Parents

[135] Consequently, it would be appropriate to address the right to know so heavily relied upon by the Court of Appeal in *CAS 1* and *CAS 2* at this juncture. In this aspect, there still remains a question as to whether the right to know can somehow trigger the protective jurisdiction under *parens patriae*.

[136] We answer this question in the negative for the following reasons.

[137] We are of the view that the issue lies in a balancing of rights in every sense of the word. In other words, does the "suppression of truth" amount to a threat to C's welfare and interest, which might necessitate the court to intervene as C's *parens patriae*?

[138] The right to know cannot be the paramount consideration for assessing the best interest and welfare of a child. As the question of "best interest and welfare" underpins most questions of family law, we would answer question 7 with regards to considerations of the best interest and welfare of children.

[139] The learned High Court Judge found at para. [49] of Her Ladyship's judgment that arts. 7 and 8 of the UNRC mandate that a child has a right to know and be cared by his birth parents. However, the "right to know" under art. 7 of the UNCRC has been reserved, which we reproduced herein for clarity:

> The Government of Malaysia accepts the provisions of the Convention on the Rights of the Child but **expresses reservations** with respect to articles 2, 7, 14, 28 paragraph 1(a) and 37, of the Convention and declares that the said provisions shall be applicable only if they are in conformity with the Constitution, national laws and national policies of the Government of Malaysia.
>
> (emphasis added)

Hence, that cannot be the premise in support of "the right to know".

[140] *CAS 1*, which relied on the Indian case of *Rohit Shekhar v. Narayan Dutt & Anor* (FAQ (OS) No. 547/2011 to hold that the child has the right to know his/her biological parents, failed to appreciate the fact that India did not make any reservation to art. 7 UNCRC. However, because the best interest of children would include emotional welfare and effective communication, the "right to know" is still an underlying consideration.

[141] The brief answer to question 7 is that the "right to know" cannot be the paramount consideration for assessing the best interest and welfare of a child. There must be a holistic welfare analysis before the best interest of a child can be determined. We also note that consent from the child is part and parcel of respecting the welfare of the child, which is especially important for children who are at the stage of adolescence, as in our case.

[142] The right to know here is vested in C and C alone. The only way someone else can consent for her is if she is incapable of comprehending the situation and a legally recognised guardian can competently consent on her behalf.

[143] To allow the application for DNA test, would present a negative impact on C, if one is to discern from the "other orders" to be made once paternity has been determined. The aftermath of the DNA order would impact C's existing legitimate relationship with the defendants, which the High Court and the Court of Appeal had acknowledged if one is to see the order made in the High Court, which includes an order of an appointment of a child psychologist to "... (disclose) the biological origins/parents of children, (and) to advice and guide the parties as to how to reintroduce the plaintiff into child C's life and his access to child C". Would it not be advisable for a child psychologist to be consulted or that consent of C is required, before such an order for a DNA test to be done?

[144] We reiterate the fact that forced paternity test is an extreme measure that invades the personal autonomy of C (refer to *Whitehall*, *Lee Lai Cheng*, *James Binsted*). We find it absurd that C would have a "right to know" her biological parents but not a right to object, that she might be subjected to a forced DNA test. What is more, in the present appeal, C does not even know there is an application by a third party for a DNA test to be conducted. The learned High Court Judge and the Court of Appeal failed to consider that C was not confused as to who is her father; that she had even at the age of less than five denied that the plaintiff is her father. C is not seeking to know her paternity. The very act of taking C to do the DNA test is in itself damaging, disrupting her *status quo* and putting into question the only reality she has known for the past 15½ years, *ie*, that D1 and D2 are her parents. She may be exposed to odium and humiliation if found to be born out of her mother's extramarital affair and hence an illegitimate child.

[145] When dealing with fragile familial structure, the judiciary should not be a forerunner that set social trends and ignore the pitfalls and legal implications of its decision in the absence of clear legislative provisions. It is wise for a court of law to err on the side of caution when dealing in such matters.

Conclusion

[146] It is evident that the older cases, be it locally or the other jurisdictions, do not provide much useful precedent in so far as the direct application of the legal principles are concerned to the facts of the present appeal. The determinative question for the present appeal is the application of the welfare principle. Our decision is very much premised on the factual matrix of the present appeal which do not warrant for this court to compel the DNA test to be done, as the negative impact on C outweighs everything else. It is definitely not in the best interest of C for the court to order for a DNA test.

[147] We, therefore, unanimously allow the appeal with no order as to costs. Accordingly, the orders of the High Court and the Court of Appeal are set aside.